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10 UNITED STATES DISTRICT COURT
11 WESTERN DISTRICT OF WASHINGTON
12 AT TACOMA

13 CECIL DUDGEON,

14 Plaintiff,

15 v.

16 DR. HENRY RICHARDS et al.,

17 Defendants.

No. 09-5200RBL/JRC

REPORT AND RECOMMENDATION

**NOTED FOR:
July 24, 2009**

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19 This 42 U.S.C. §1983 Civil Rights matter has been referred to the undersigned Magistrate
20 Judge pursuant to 28 U.S.C. §§ 636(b)(1)(A) and 636(b)(1)(B) and Local Magistrate Judges'
21 Rules MJR 1, MJR 3, and MJR 4.

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23 This matter comes before the court upon plaintiff's motion for entry of default (Dkt # 8).
24 Having considered the entire file, including the response and the reply, the undersigned
25 recommends the motion be DENIED. Further, the court recommends that in the interest of
26 judicial economy, Defendants' motions to invalidate the waiver of service also be DENIED.

REPORT AND RECOMMENDATION- 1

FACTS AND PROCEDURAL HISTORY

The complaint in this action was lodged April 6, 2009. Plaintiff did not pay the filing fee or file a motion to proceed *in forma pauperis*, thus, the action was not commenced on April 6, 2009. An action is commenced when the complaint is filed. See Fed. R. Civ. P. 3. On April 20, 2009, plaintiff filed a “declaration of service” indicating that on April 13, 2009, he sent copies of the complaint to each defendant at a business address 1715 Lafayette Street, Special Commitment Center Administration, P.O. Box 88450 Steilacoom WA. 98388. The declaration does not indicate a summons was sent to any named defendant (Dkt # 3). On April 21, 2009, plaintiff cured defects in his original pleadings by paying the full filing fee. Although this occurred on April 21, 2009, the entry was not posted in the electronic filing system until May 12, 2009 (Dkt. # 4).

On May 14, 2009, plaintiff filed an affidavit stating that he had sent each defendant a copy of the complaint and a certificate of service by U.S. Mail. The affidavit again lists the P.O. Box address in Steilacoom (Dkt. # 5). On May 28, 2009, Assistant Attorney General William M. Van Hook appeared on behalf of defendants. On the same day he filed a letter he allegedly sent to plaintiff (Dkt # 6 and 7). The letter indicates counsel does not believe service was proper, but, that the defendants were willing to save plaintiff the cost of effecting proper service and would send him executed waivers of service. Counsel further stated in his letter that the defendants received the complaints by mail on April 22, 2009. Thus, if waivers of service were executed, the answer would be due by June 22, 2009 (Dkt. # 7). Finally, counsel states that it was his understanding that based on this agreement to accept service by mail and waive service of a summons; plaintiff would withdraw his motion for default (Dkt # 7).

1 The same day the notice of appearance and letter were filed, plaintiff filed a formal
2 motion for default (Dkt # 8). Plaintiff submitted the signed waivers of service dated April 22,
3 2009, which he allegedly received in accordance with the agreement, as proof of perfection of
4 service (Dkt # 11). Defense counsel responded to the motion for default (Dkt # 9). Defendants
5 note that if they had refused or failed to waive service, then plaintiff would have been required to
6 perfect proper service, as required by Fed. R. Civ. P. 4 (c) (Dkt. # 9).

8 Defense counsel alleges that plaintiff agreed to withdraw his motion for default if
9 defendants waived service and filed an answer within sixty days of April 22, 2009, as allowed by
10 Fed. R. Civ. P. 4 (d). Defense counsel states that based on the agreement, defendants mailed the
11 executed waivers of service (Dkt # 9). Defense counsel also points out that by filing the motion
12 for default, plaintiff breached the agreement. (Dkt #10) Based on the alleged breach of the
13 agreement, defendants now seek to ask this court to invalidate the waivers of service and to force
14 plaintiff to properly serve the action under Fed. R. Civ. P. 4 (c).

16 In his reply, plaintiff admits to agreeing to the terms as outlined by defense counsel (Dkt
17 # 12, page 3). Rather than withdraw his motion, plaintiff alleges that he informed counsel that he
18 would withdraw the motion for default only when an answer was received.

19 While all of this was going on, defendants filed their answer on June 22, 2009, as per the
20 earlier alleged agreement between the parties. (Dkt #13) Plaintiff has not withdrawn his motion,
21 necessitating a ruling on the motions before the court.

23 DISCUSSION

24 Default judgments are disfavored by the law and cases should be decided on their merits
25 except in extreme cases. Mendoza v. Wight Vineyard Management, 783 F.2d 941, 945-46 (9th
26 Cir. 1986). In this case, no defendant was ever served in accordance with Fed. R. Civ. P. 4 (c),

1 which requires personal service of a copy of the complaint and a summons. Service by mail is
2 not allowed under Fed. R. Civ. P. 4 (c). Thus, no defendant was required to file an answer
3 within 20 days of service as set forth in Fed. R. Civ. P. 12 (A)(1)(a)(i). Furthermore, defendants
4 have now filed their answer. Therefore, it is recommended that plaintiff's motion for default be
5 DENIED.

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7 It is uncontested that plaintiff received signed waivers of service from defendants.
8 Defendants ask the court to find the waivers invalid. For the reasons stated below, it is also
9 recommended that this request be DENIED.

10 Had the defendants answered in accordance with the waiver provisions, the answers
11 would have been due on June 22, 2009, at the earliest. The defendants duly filed their answer on
12 that date. In order to put this case back on track and avoid additional motions, counter motions,
13 service expenses and unnecessary delay, it is recommended that the court acknowledge receipt of
14 the waivers of service from defendants and get on with addressing the merits of the case.
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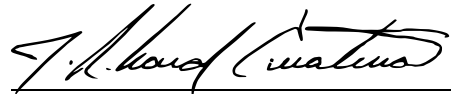
16 17 CONCLUSION

18 This court recommends that plaintiff's motion for default be DENIED. It is also
19 recommended that defendants' request to invalidate the acceptance of service forms be DENIED,
20 as well.

21 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil
22 Procedure, the parties shall have ten (10) days from service of this Report to file written
23 objections. *See also*, Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those
24 objections for purposes of appeal. Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the
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1 time limit imposed by Rule 72(b), the clerk is directed to set the matter for consideration on **July**
2 **24, 2009**, as noted in the caption.

3 DATED this 26th day of June, 2009.

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6 J. Richard Creatura
7 United States Magistrate Judge
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